

Title	The Addressees of the Responses of P. Alfenus Varus and the Accessibility of 'Ordinary' People to his Legal supports in late Republican Rome
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Citation	
Issue Date	2019-09-04
oaire:version	AM
URL	https://hdl.handle.net/11094/73635
rights	
Note	

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Osaka University

SIHDA 2019, 73rd Session

At the University of Edinburgh

"The Addressees of the Responses of P. Alfenus Varus and the Accessibility of 'Ordinary' People to his Legal supports in late Republican Rome"

4th September 2019

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I. Introduction – The responses of Jurists in their social and intellectual context

In this presentation, I want to analyse the legal opinions of P. Alfenus Varus(hereafter, Alfenus) collected by O. Lenel in his *Palingenesia Iuris Civilis* with a particular attention on the forms in which legal questions are raised and answers to them are given.¹ Here I explain how this topic was chosen.

I had a chance to analyse the forms of questions and answers found in the *libri responsorum* of Paulus as well as the collection of answers by the other jurists in the classical period of Roman jurisprudence.² I found such approaches of meaning in order to think about the formation of doctrines and the legal educations within the intellectual community of jurists. At the same time, I had an interest in the role and meaning of responding activities offered to the citizens by the jurists in the Roman society. Such an interest of mine has been nurtured with the methodological hints and backgrounds of “Roman law and society” approaches.³ So, the recent publication of *The Oxford Handbook of Social Relations in the Roman World* and *The Oxford Handbook of Roman Law and Society* was very stimulating to me.⁴ I would like to add that there is a continuous attention to the “Law and Society”

¹ O. Lenel, *Palingenesia Iuris Civilis* 2 Bde.(Leipzig, 1889)(hereafter Lenel, PIC),

² Tomoyoshi Hayashi, “‘ask and he gave his opinion’(quaero, respondit) – Some Reflections on the Forms of Legal Questions and Responses in D. 17,1,59 and on their Background” in: U. Manthe, S. Nishimura, M. Igimi, *Aus der Werkstatt römischer Juristen* (Berlin,2016)

³ Ed. Ed. P. J. Du Plessis, K. Tuori, C. Ando, *The Oxford Handbook of Roman Law and Society*(Oxford, 2016)(Hereafter *Handbook*) For the formation of a long and stable tradition of this approach and for the methodological framework, see the 1st chapter “A Word from the Editors” and the 2nd chapter “Framing ‘Law and Society’ in the Roman World” (*Handbook*, pp.3-20) For the bibliographical data of the *Handbook*, see the next note 4.

⁴ Ed. M. Peachin, *The Oxford Handbook of Social Relations in the Roman World*(Oxford, 2011) For the publishing data of the *Handbook*, see note 3.

approach in Japanese legal historians' community as well. As to the Roman Law sector of the Japanese legal historians, the late Yoshino refers to Crook especially in his influential handbook on the Roman law and its society published in 1976.⁵ Being influenced by such a tradition, I myself share such a concern.

II. D. 9,2,52 – A possibility for an “ordinary” Roman to have access to legal advices

Knapp, a historian with one of his works translated into Japanese, contributes a chapter to the *Handbook* with the title, “Legally Marginalised Groups – The Empire”.⁶ His work *Invisible Romans* as well as his chapter in the Handbook suggest the possible fruitfulness of Roman law and jurisprudence in a wider social context including the gradation from the people at the central core of powers to the extreme outer fringe of outlaws.

In the *Handbook*, he discusses the accessibility of ordinary men to the jurists' responses, arguing “In addition, although the difference in rank and awareness might cause hesitation, there are examples of simple people asking for legal help, strongly indicating that such people could and did on occasion use the legal system.” and he quotes an English translation of fragment of Alfenus as follows.⁷

Tabernarius in semita noctu supra lapidem lucernam posuerat: quidam praeteriens eam sustulerat: tabernarius eum consecutus lucernam reposcebat et fugientem retinebat: ille flagello, quod in manu habebat, in quo dolor inerat, uerberare tabernarium coeperat, ut se mitteret: ex eo maiore rixa facta tabernarius ei, qui lucernam sustulerat, oculum effoderat: consulebat, num damnum iniuria non uidetur dedisse, quoniam prior flagello percussus esset. respondi, nisi data opera effodisset oculum, non uideri damnum iniuria fecisse, culpam enim penes eum, qui prior flagello percussit, residere: sed si ab eo non prior uapulasset, sed cum ei lucernam eripere uellet, rixatus esset, tabernarii culpa factum uideri. (underlined by Hayashi)

⁵ S. Yoshino, *Roma Hoh to Sono Shakai (Roman Law and its Society)* (Tokyo, 1976) (In Japanese), p.291f. 吉野悟『ローマ法とその社会』(近藤出版社、1976年) Along with the works in German and in English written by the authoritative scholars (Koschaker, Wieacker, Mommsen, Kaser, Kunkel, Wenger, Schulz, Buckland, Marx, Weber, Ehrlich et al.), he notes J. Crook, *Law and Life of Rome 90 B.C. – A.D. 212* (Ithaca, 1967) (Hereafter, Crook, *Law and Life*) particularly.

⁶ Knapp, Robert, *Invisible Romans - Prostitutes, outlaws, slaves, gladiators, ordinary men and women ... the Romans that history forgot* (London, 2011) The data of the Japanese translation are as follows. (ロバート・クナップ著・西村昌洋監訳・増永理考＝山下孝輔訳『古代ローマの庶民たち ― 歴史からこぼれ落ちた人々の生活』白水社 Hakusui-sha, Tokyo, 2015)

⁷ Knapp, *Guidebook*, p.369 ; D. 9,2,52,1 (Alfenus Varus, *Digesta* 2) Knapp cites the English translation by Watson. I cite Latin text itself from the Mommsen's *editio maior*. As to the *Digesta* texts quoted in this handout in general, I follow it.

Knapp shows this source as an evidence that an ordinary shopkeeper could get a legal opinion by Alfenus. In this source, the story of chase and violence is amply detailed and its thrill itself attracts us as Crook says “the quarrel over removal of a street-lamp, which might as easily come out of Petronius or James Joyce”.⁸ But let us focus on the accessibility to the legal responses for a relatively humble people and put aside the amusing anecdotal story as well as his academic arguments concerning the recognition of *culpa* and the applicability of *lex Aquilia*.⁹

In the next section, I will browse the extant fragments collected by Lenel and check the forms of questions and answers found there. Before doing so, I want to comment on the textbook level premises surrounding Alfenus and his major work *Digesta*. First, as to the jurist himself Alfenus worked in the late Republic and in the early Principate. He was a pupil of Servius Sulpicius Rufus and enjoyed a relatively high reputation along with Aulus Ofilius among the ten co-pupils according to the list of Pomponius.¹⁰ He lived in an age of expansion as to the number of jurists. Second, as to his work his *Digesta* occupies a particular place in the development of Roman jurisprudence because it is practically the first work to bear its title in the form of epitomes by Paulus and by an anonymous jurist in the Justinian’s *Digesta* etc. Also, Lenel attributes 70 to this work and the number of extant fragments exceeds any one of anterior jurists. Third, I mention the legal education and the development of legal doctrines in his days. As the name *Servii auditores* suggests, the jurists to be were trained orally in order to acquire the art(*ars*) of applying laws and giving legal responses. But legal literature was as important in the legal education as in the development of legal doctrines. Young pupils must have read a lot in addition to listening to their master’s giving responses and to making discussions in the form of questions and answers. On the other hand, many traces of legal writing and citations of anterior jurists are extant and among them the *Digesta* of Alfenus is particularly inferred to contain many responses of his master Servius. Besides, as some traces of dispute between Servius and forerunning Q. M. Scaevola Pontifex demonstrate, the intellectual culture of jurists in general in those days was seen as competitive.¹⁰ So, some citations may have been done in critical contexts while others were done to gain authority from the great jurists of their former generations.

III. Fragments of Alfenus – Who raised the questions and to whom he responded?

⁸ Crook, *Law and Life*, p. 34

⁹ I would like just to mention the other two sources(D. 17,1,26,8; D.11,7,14,1) referred in Knapp’s arguments concerning the relationship with the ordinary people and law.(Knapp, *Handbook*, p.369)

¹⁰ e.g. D. 1,2,2,43(Pomponius *liber singularis enchiridii*)

At the end of this handout, I attach a table of 90 fragments of Alfenus collected by Lenel. I begin with the possible classification of persons bearing their legal questions and answers i.e. questioners and responders. First, who were the presenters of questions and addressees of responses? As possible presenters, I could provisionally presuppose a client with legal problems, a pupil, a colleague under controversy, or the jurist himself. Second, there is almost no need to pose a question. The responders may be the jurist or the master of jurist. Third, who will get the benefit of legal responses? I could presuppose a client in need of legal advice, his pupils, his colleague, himself, or the readers in future who might read the records of his collections of responses. Besides, I thought of 4 possible scenes of the legal questions & answers. First, a client may ask for his expert advice whether at forums or at his house, as Cicero suggested in his *De Oratore*, 3,33,133.¹¹ The image of jurists in the forum for consultation rather than at school or study is also suggested by Gellius, though he was born at the early first century A. D. and is considerably later than Alfenus.¹² Second, the jurist himself or his pupil may have posed a question and sought for more precise answers at the chance of oral legal education. Third, he may have given questions and answers with his colleagues as opponents of academic dispute considering the competitive cultures of Roman jurists as touched above. But the third possibility may not fit the expression of “respondit” or “respondi”.¹³ Fourth, the jurist may have developed his questions and answers by himself at his study. We can see numerous legal doctrines developed by posing questions and giving answers including precise distinctions as to cases and to each effect following the particular case. Let me have one *excursus*. Ofilius, a major co-pupil of Alfenus, is reported to have posed a question and to have responded to it to develop his own arguments.¹⁴ Posing a question and replying within one person can be an

¹¹ "Equidem saepe hoc audiui de patre et de socero meo, nostros quoque homines qui excellere sapientiae gloria vellent omnia quae quidem tum haec civitas nosset solitos esse complecti. Meminerant illi Sex. Aelium; M'. vero Manilium nos etiam vidimus transverso ambulante foro, quod erat insigne eum qui id faceret facere civibus omnibus consilii sui copiam; ad quos olim et ita ambulantes et in solio sedentes domi sic adibatur non solum ut de iure civili ad eos verum etiam de filia collocanda, de fundo emendo, de agro colendo, de omni denique aut officio aut negotio referretur."

¹² "Cum ex angulis secretisque librorum ac magistrorum in medium iam hominum et in lucem fori prodissim, quaesitum esse memini in plerisque Romae stationibus ius publice docentium aut respondentium, an quaestor populi Romani a praetore in ius vocari posset." (Gell., *Noctes Atticae*, 13,13,1) Cf. Crook, *Law and Life*, p. 90

¹³ I must check the *Libri Disputationis* literatures in future to have my own concrete opinion.

¹⁴ Lenel, PIC, I, S. 796. no.6 "Unde quaerit Ofilius, si ad reficiendam nauem mutuatus nummos in suos usus conuerterit, an in exercitorem detur actio, et ait, si hac lege accepit quasi in nauem impensurus, mox mutauit uoluntatem, teneri exercitorem imputaturum sibi, cur talem praeposuerit: quod si ab initio consilium cepit fraudandi creditoris et hoc specialiter non expresserit, quod ad nauis causam accipit, contra esse: quam distinctionem Pedius probat." D. 14,1,1,9(Ulp. ad ed. 28) (underlined by Hayashi)

effective way to propel legal arguments either orally or through writing.

With such possibilities in mind, I check the table. First, the verbs “consulere”, “quaerere”, “rogare”, and “interrogare” are used for giving questions and “respondere”, “putare”, “aio” is used for giving answers in various forms.¹⁵ As the *Digesta* is well-known for citing the answers of Servius as the master of Alfenus, “respondit” might mean those given by Servius and “respondi” by Alfenus.¹⁶ But I don’t think this rule to be applicable with no room for exceptions. “consulere” might be used at the real consultation more frequently but would not be exclusive to posing questions at educational opportunities or at academic discussions as well as writing. On the other hand, “quaesitum est” could be more frequently used for posing questions at academic opportunities in general. Generally, active voice in general and passive voice with a specified actor can suggest the existence of a real client or questioner while passive voice without specifying the actor could suggest the existence of an object problem to be responded.

Some fragments suggest the existence of real clients who requested the responses by Alfenus or Servius and who bear some information on their social attributes. As was cited by Knapp, a shopkeeper who injured a thief in the course of chasing him to recover a lamp asks the jurist about his responsibility at the no. 7. At the subsequent paragraph within no.7, an owner of a slave boy who was run over by a cart in an accident asks the jurist the possible ways to recover his damage.¹⁷ At the no.19, an heir consulted the jurist about the fulfilment of a condition to build a monument imposed by the head of the family as the testator. At the no.21, an erroneous testator imposes on the heirs an impossible condition to build a monument following the non-existent sample specified by a misunderstanding of the former and the latter accordingly consult the jurist to give them responses. Both no. 19 and 21 cases suggest some wealth of the clients and their family to make building of a monument a condition for the inheritance. At the no.49, an owner of a slave was sued for the recovery of the slave and also for the theft committed by the slave concurrently and asks the jurist the prospect. Though the expression “quaerebat”, not “consulebat” is used, it

¹⁵ “respondit” for 53 times, “respondi” for 16 times, “ait” for 3 times, “aiebat” once, “puto” once, and “mihi placet” once. I ignored the expressions found in the citations of other legal or non-legal sources.

¹⁶ The identification of the jurist who gave responses is out of the focus for this presentation.

¹⁷ “In cliuo Capitolino duo plostra onusta mulae ducebant: prioris plostri muliones conuersum plostrum subleuabant, quo facile mulae ducerent: inter superius plostrum cessim ire coepit et cum muliones, qui inter duo plostra fuerunt, e medio exissent, posterius plostrum a priore percussum retro redierat et puerum cuiusdam obtriuerat: dominus pueri consulebat, cum quo se agere oporteret. respondi in causa ius esse positum...(underlined by Hayashi” D. 9,2,52,2(Alfenus, *Digesta* 2) I confine the citation of Justinian’s *Digesta* text to some selected exemplary fragments in order to save pages.

suggests a real case and a client out of the jurists' community. At the No. 54, the lender of a mule who had his mule fall down as the lesser gave it a burden exceeding the terms at the *locatio conductio*, consults the jurist on the possible remedies for the damage.¹⁸

Very probably, the questioners in the above mentioned cases must have been really existing clients rather than virtual characters playing roles in the hypothetical cases comprised by the jurist. The above cases suggest the possibility for an "ordinary" citizen to have an access to the legal responses of the top jurist in his age, whether he be Servius or Alfenus.

The No. 19 and the 21 suggest some wealth of the clients. But the others are modest citizens like employees or persons engaged in small business. Their jobs are really unlike the ones recommended by Cicero in the *De officiis* 1,150-151, as suitable for free citizens while showing contempt for the other. Therefore, we can infer the legal advices directly given to ordinary citizens by jurists including the top ones.

Some sets of questions and answers suggest dialogues or discussions within the jurists' community, whether educational or controversial. At the No. 26, the subject of "rogauit" may be Alfenus and Servius was the responder considering the expression "respondit". But I can not exclude the possibility that both the questioner and responder were Alfenus.¹⁹

IV. Conclusion

Again, the extant fragments of Alfenus occupy a particular place in the study of Roman legal doctrines. Compared with the jurists of the former generations like Quintus Mucius Scaevola Pontifex, C. Aquilius Gallus, Servius etc., the extant fragments of his writings are greater in quantity and more detailed. By checking them, I could trace his or his master Servius's questions and answers developed partially with citizens out of the jurists' community and partially within it. The questions and answers were recorded down and was read, cited, and sometimes criticized by the posterior Roman jurists. Through this study, I can safely say that ordinary citizens could have access to the famous jurists' responses in the late Republic and the early Principate and it acted as an interface between the real needs of the society and the autonomous development of legal doctrines within the jurists' community. In this sense, Knapp's finding and citation was a very useful guide to me. At the same time, the production of legal doctrines within the community of jurists

¹⁸ D. 19,2,30,2 "Qui mulas ad certum pondus oneris locaret, cum maiore onere conductor eas rupisset, consulebat de actione. respondit uel lege Aquilia uel ex locato recte eum agere, sed lege Aquilia tantum cum eo agi posse, qui tum mulas agitasset, ex locato etiam si alius eas rupisset, cum conductore recte agi."(*Alfeni liber a Paulo epitomatorum* 3)(Underlined by Hayashi)

¹⁹ D. 38,1,26,1 "Item rogauit, si has operas liberti dare nollent, quanti oporteret aestimari. respondit, quantum ex illorum operis fructus, non quantum ex incommodo dando illis, si prohiberet eos medicinam facere, commodi patronus cosecuturus esset."(*Alfenus Digesta* 2)(Underlined by Hayashi)

through the questions and answer was also very active even at this early stage of the development of the Roman jurisprudence. Compared with my previous research on the *Libri responsorum* of Paulus and its circumstances, the jurists and citizens were by far nearer with each other. Ordinary legal services to ordinary citizens may have been conceded to the jurists of lower ranks with their knowledge formed through *Institutioes* at the age of Paulus.²⁰ On the contrary, the forms of questions and answers were more formalized in typical pairs such as “quaero” = “respondi” or “quaero” = “respondit” “quaesitum est” = “respondit” etc. in the classical period. But still, the basic form of questions and answers existed as a mode of producing and refining legal doctrines in the jurists’ community or at each jurist’s legal reasoning in the late Republican Rome. After all, the community of the jurists in Rome and their responding activities occupied a certain place in the Roman society and among her members in a never isolated way.

(End)

Finished on 27 August 2019

²⁰ For the separation of jurists and the situations of jurists under the Principate, I followed the overview by Frier at *The Oxford Classical Dictionary 4th edition* (Ed. by S. Hornblower, and S. Spawforth et al. (Oxford, 2012)), p.801f.